NO. 44756-8-II

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STATE OF WASHINGTON,

Respondent,

v.

JAMES SHARPLES,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR SKAMANIA COUNTY

HONORABLE JUDGE BRIAN P. ALTMAN

HONORABLE JUDGE PRO TEM E. THOMPSON REYNOLDS

SUPPLEMENTAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

A. ISSUE PRESENTED.....1

B. STATEMENT OF THE CASE.....1

C. ARGUMENT.....2

SHARPLES' TRIAL ATTORNEY WAS NOT INEFFECTIVE IN HAVING PROPOSED THE WASHINGTON PATTERN JURY INSTRUCTIONS ON THE SENTENCING ENHANCEMENT, ALLEGING THAT THE APPELLANT REFUSED A TEST TO DETERMINE HIS BREATH ALCOHOL CONCENTRATION, BECAUSE THERE WAS NO PREJUDICE TO SHARPLES AND BECAUSE TO DATE, NO WASHINGTON COURT HAS DISAPPROVED OF THESE INSTRUCTIONS.....2

D. CONCLUSION.....5

TABLE OF AUTHORITIES

Table of Cases

WASHINGTON CASES Page

State v. Boyer,
91 Wn.2d 342, 588 P.2d 1151 (1979).....2

State v. Doogan,
82 Wn. App. 185, 917 P.2d 155 (1996).....2

State v. LeFaber,
128 Wn.2d 896, 913 P.2d 369 (1996).....5

State v. Studd,
137 Wn.2d 533, 973 P.2d 1049 (1999).....4-5

State v. Thomas,
109 Wn.2d 222, 743 P.2d 816 (1987).....2-3

FEDERAL CASES

Strickland v. Washington,
466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984),
rehearing denied,
467 U.S. 1267, 104 S. Ct. 3562, 82 L.Ed.2d 864 (1984).....2-3

Rules, Statutes, and Regulations

Washington State

WPIC 92.03.....1-2

WPIC 92.13.....1

A. ISSUE PRESENTED

Did the appellant's trial attorney's having proposed the Washington Pattern Jury Instructions on the sentencing enhancement, alleging that the appellant refused a test to determine his breath alcohol concentration, constitute ineffective assistance of counsel?

B. STATEMENT OF THE CASE

Both parties proposed the same jury instruction, CP 50, 132, and special verdict form, CP 63, 154, with respect to the sentencing enhancement alleging that Sharples refused a test to determine his breath alcohol concentration.

The trial court adopted the jointly proposed instruction, CP 86, and special verdict form, CP 107, which were taken verbatim from the Washington Pattern Jury Instructions, specifically WPIC 92.13 (instruction) and WPIC 92.03 (special verdict form), as follows:

> A person refuses a law enforcement officer's request to submit to a test to determine the person's breath alcohol concentration when the person shows or expresses a positive unwillingness to do the request or to comply with the request.

WPIC 92.13.

> Did the defendant refuse to submit to a test of his breath which was requested by a law enforcement

officer for the purpose of determining the alcohol concentration of the defendant's breath?

WPIC 92.03.

The jury's response to the special verdict was, "Yes". CP 107.

Sharples argues that proposing this instruction and special verdict form constituted ineffective assistance of counsel, Appellant's Supplemental Brief at 3-6.

C. ARGUMENT

SHARPLES' TRIAL ATTORNEY WAS NOT INEFFECTIVE IN HAVING PROPOSED THE WASHINGTON PATTERN JURY INSTRUCTIONS ON THE SENTENCING ENHANCEMENT, ALLEGING THAT THE APPELLANT REFUSED A TEST TO DETERMINE HIS BREATH ALCOHOL CONCENTRATION, BECAUSE THERE WAS NO PREJUDICE TO SHARPLES AND BECAUSE TO DATE, NO WASHINGTON COURT HAS DISAPPROVED OF THESE INSTRUCTIONS.

Ordinarily, a party may not "request an instruction and later complain on appeal that the requested instruction was given," State v. Boyer, 91 Wn.2d 342, 345, 588 P.2d 1151 (1979). However, with respect to jury instructions, this doctrine "is not a bar to review of a claim of ineffective assistance of counsel," State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996).

To sustain a claim of ineffective assistance of counsel, Sharples must prove that counsel's representation was "'deficient'"

and that the "'deficient'" representation "'prejudiced the defense.'" State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987), citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984), rehearing denied, 467 U.S. 1267, 104 S. Ct. 3562, 82 L.Ed.2d 864 (1984).

To satisfy the first deficiency prong, Sharples must show that "'counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" Thomas, 109 Wn.2d at 225, quoting Strickland, 466 U.S. at 687. "[S]crutiny of counsel's performance is highly deferential and courts will indulge in a strong presumption of reasonableness." Id. at 226.

> To satisfy the second prong, an appellant must prove that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Strickland, 466 U.S. at 694.

The reviewing court can consider the prongs in either order and need not reach the issue of deficiency if the appellant was not prejudiced. Id. at 697.

Here, Sharples was not prejudiced for the reasons laid out in Section 3b of the initial Brief of Respondent. As argued there, the instructions given did not relieve the State of its burden to prove every element of the sentencing enhancement. Therefore, there was no prejudice to Sharples.

However, in this case, the Court need not even reach the issue of prejudice since Sharples' trial attorney's performance cannot be found deficient where, as here, he proposed Washington Pattern Jury Instructions that have not been disapproved by any Washington court.

This principle was articulated by the State Supreme Court in State v. Studd:

> [C]ounsel can hardly be faulted for requesting a jury instruction based upon a then-unquestioned WPIC 16.02. Thus we do not even reach the second part of the test [i.e. prejudice]. . .

137 Wn.2d 533, 551, 973 P.2d 1049 (1999).

Sharples complains that in this situation, the Court is allowed "to affirm convictions obtained in violation of the constitution," Supplemental Brief of Appellant at 5.

However, the State Supreme Court already impliedly considered and rejected such an argument in Studd, supra., where the issue,

i.e., "whether a jury instruction that was clearly erroneous in its statement of self-defense law should alone be grounds for a new trial," was specifically recognized as "'an error of constitutional magnitude,'" 137 Wn.2d at 545-546 (quoting State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996))[other citations omitted].

D. CONCLUSION

For the above reasons, Sharples' sentence for Driving under the Influence under the mandatory minimum for refusing the breath test should be upheld.

DATED this 8th day of May, 2014

RESPECTFULLY submitted,

By: _____
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SKAMANIA COUNTY PROSECUTOR

May 08, 2014 - 1:58 AM

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